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No. 79-1863

In the Supreme Court of the United States

OCTOBER TERM, 1979

DONALD WINSTON HARPER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the suspicionless Coast Guard boarding of an American vessel on the high seas violated petitioners' Fourth Amendment rights.

2. Whether the confessions of petitioners Harper and Rowe were voluntary.

3. Whether the actions of government agents in stopping automobiles driven by petitioners Talbert and Herring violated their Fourth Amendment rights.

4. Whether voice identification testimony admitted against petitioner Forbes was the fruit of an unlawful arrest.

5. Whether petitioners were improperly deprived of de novo consideration by the district court of the magistrate's recommendations on the suppression motions.

6. Whether the evidence was sufficient to support petitioners' convictions for conspiracy to import marijuana.

7. Whether the jury selection plan of the United States District Court for the Eastern District of North Carolina deprived petitioner Herring of a jury drawn from a fair cross section of the community, in violation of the Jury Selection and Service Act of 1968 or the Constitution.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 617 F. 2d 35.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1980. A petition for rehearing was denied on March 26, 1980. The Chief Justice extended the time for filing a petition for a writ of certiorari to May 24, 1980, and the petition was filed on May 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a non-jury trial in the United States District Court for the Eastern District of North Carolina, petitioners were convicted of conspiring to import marijuana into the United States, in violation of 21 U.S.C. 963. Petitioners Talbert, Herring, Burdine, and Jackson were each sentenced to three years' imprisonment; petitioner Jackson was also fined $5,000. Petitioners Jenkins, Black, and White were each sentenced to five years' imprisonment, all but six months of which was suspended, and were placed on probation for five years. Petitioners Rowe and Harper were each sentenced to five years' imprisonment, all of which was suspended in favor of five years' probation; in addition, they were each fined $4,000. Petitioner Forbes was sentenced to four years' imprisonment and a $10,000 fine. Petitioner Govus was sentenced to five years' imprisonment and a $15,000 fine. In addition, all petitioners received a two-year special parole term.[1] The court of appeals affirmed (Pet. App. 1a-14a).

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[1]Petitioners have not challenged their special parole terms. However, in *Bifulco* v. *United States*, No. 79-5010 (June 16, 1980),

The evidence is recounted in the opinion of the court of appeals and in the magistrate's recommendations on the motions to suppress (Pet. App. 3a-4a, 10a-12a, 19a-21a, 53a-58a, 82a-86a). It showed that in January 1978 the United States Coast Guard was engaged in patrolling the Carribean sea lanes for general law enforcement purposes, with a special emphasis on drug interdiction. On January 25, the Coast Guard cutter ALERT spotted the LADY ELLEN, a fishing vessel of North Carolina registry, in the Mona Passage between the Dominican Republic and Puerto Rico. Following its policy of stopping all United States vessels in the region less than 250 feet in length, the crew of the ALERT stopped and boarded the LADY ELLEN and inquired of its captain the vessel's destination and point of embarkation. The captain responded, "You got me, I'm coming from Colombia and I have a load of marijuana on board." The captain and his crew, consisting of petitioners Rowe and Harper, were immediately arrested. A search of the vessel uncovered approximately 25 tons of marijuana.

Thereafter, the crew agreed to cooperate in a controlled delivery of the marijuana to their co-conspirators in North Carolina. At Morehead City, North Carolina, the LADY ELLEN, while under continuous surveillance, picked up a man, later identified as petitioner Forbes, who took over its navigation to the landing site. As it approached the site, customs officers in patrol boats, who had been following the LADY ELLEN, observed an off-white or beige 1970 or 1972 model Plymouth or Dodge on the bank at a bridge. The headlights of the automobile

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this Court recently held that a special parole term may not be imposed as part of a sentence for narcotics conspiracy. Petitioners may move for correction of their sentences in the district court under Rule 35, Fed. R. Crim. P.

were turned on the boats as they passed. Subsequently, while unloading, the captain of the LADY ELLEN overheard a radio warning from an apparent lookout that small boats were speeding toward the site. When alerted about the approaching boats, the supervisor of the operation ordered the captain to sail the LADY ELLEN away from the dock, but the vessel was intercepted by a patrol boat waiting upstream.

Meanwhile, agents maintaining surveillance from the air observed several small boats sailing away from the LADY ELLEN and directed land units toward the place where those boats had docked. At about 5:00 a.m. the agents closed in on a clearing, where they observed a frame house, a newly-constructed fish house, and a newly constructed dock. They observed large trucks lined with plastic and pickup trucks with campers and loading devices. The agents also noticed a boat docked near the fish house that was stacked with bales of marijuana. Upon entering the frame house, they discovered petitioners Jackson, Jenkins and White, dressed in heavy work clothes and high rubber boots. On the table the agents saw various electronic devices, including a police scanner and a CB transmitter and receiver. They also saw a role of duct tape similar to that used on the plastic inside the trucks. The three petitioners were immediately arrested.

After the landing site was secured, federal and state officers left to look for suspects who might be fleeing via the only paved road with access to the site. The officers also had some knowledge of the apparent lookout at the bridge, and, from the size and nature of the smuggling operation, they expected to encounter lookouts and other participants in the area seeking escape. At 5:45 a.m., they stationed their car off the road three miles from the landing site and about seven-tenths of a mile from a dirt road leading to the site. The paved road ended, with no outlet, a few miles past the dirt road.

In the first hour, one car passed. It was stopped and the driver, a nurse on her way to work, was allowed to proceed. The second car stopped was a cream-colored 1972 Dodge. The officers, who were not in uniform, identified themselves as law enforcement officers. The driver, petitioner Talbert, was asked for his driver's license and automobile registration. He produced a North Carolina license and a car rental agreement showing that the car had been rented to a third party ("Leroy J. Edwards"); he told the officers that he was in the area for "hang gliding." The state officer arrested him on an alcohol charge. Subsequently, Talbert was implicated in the marijuana importation conspiracy.

As this questioning was being conducted, other police cars arrived on the scene. The police cars created a visible checkpoint area as a third car, driven by petitioner Herring, approached. The car was a grey, early-1970s model Plymouth. When Herring drove up to the police cars, he was asked for a license and car registration. He produced a Georgia driver's license and a rental agreement from the same car agency as Talbert's, showing that his car had also been rented in the name of "Leroy J. Edwards." When asked what he was doing in the area, he replied he was there to go "hang gliding." He then volunteered to go to Morehead City for photographing and fingerprinting, and was later implicated in the conspiracy.

ARGUMENT

1. Petitioners contend (Pet. 13-21) that the boarding of the LADY ELLEN violated their Fourth Amendment rights because it was unsupported by probable cause or reasonable suspicion to believe that there was marijuana aboard. But the absence of probable cause or reasonable suspicion does not establish that petitioners' Fourth Amendment rights were violated by the Coast Guard's

actions in this case. Contrary to petitioners' contention (Pet. 15), the evidence showed that the purpose of the Coast Guard patrol was to enforce all United States laws, including safety and documentation requirements, and not just those laws relating to narcotics smuggling (Pet. App. 4a, 19a). This Court has recently declined, on several occasions, to review similar claims that the Fourth Amendment was violated by warrantless and suspicionless boardings of vessels on the high seas by Coast Guard officers conducting safety and documentation checks. See *Erwin* v. *United States*, cert. denied, No. 79-579 (Feb. 19, 1980); *Warren* v. *United States*, cert. denied, No. 79-6217 (May 19, 1080); *Coats* v. *United States*, cert. denied, No. 79-1230 (Apr. 21, 1980).[2] There is no greater reason to grant review here.

Indeed, even if the Court were to decide that this issue might warrant review in an appropriate case, this is not such a case, for several reasons. To begin with, we think it plain that petitioners Rowe and Harper are the only ones who may assert this claim, since they are the only petitioners who were aboard the vessel at the time it was stopped. While others of the petitioners have claimed a proprietary interest in the LADY ELLEN,[3] the legal

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[2]Coats was a co-defendant of these petitioners, and his case involved the same boarding of the LADY ELLEN involved here. The court of appeals held that Coats did not have "standing" to contest the validity of the boarding. *United States* v. *Coats*, 611 F. 2d 37, 39-40 (4th Cir. 1979).

[3]Petitioners Govus, Jenkins, White, and Burdine filed vague and conclusory affidavits claiming a "proprietary" interest in the vessel and its cargo, but none testified at the suppression hearing or at trial concerning the nature of his interest. The government presented documentary proof that the owner of the LADY ELLEN was a person using the alias "Walter Poole." While the evidence indicated that petitioner Govus was one the organizers of the venture, entrusted with the responsibility of getting a boat to Colombia and back with a

challenge here is not to the search of the vessel, which was supported by probable cause,[4] but solely to the initial boarding. While that action affected the freedom of movement of the occupants of the vessel, constituting a "seizure" of their persons as well as of the vessel, it had no material impact on the property rights of the owners of the vessel. Having relinquished operation and control of the vessel to its crew, no interest of the owners was impaired by a brief interruption in the progress of the vessel, which could have occurred for any of a wide range of reasons. In sum, the mere stopping of a vessel on the high seas does not affect any Fourth Amendment right of its owners, and therefore they may not challenge its legality.

Moreover, while we believe that the Constitution permits random stops of vessels for safety and document inspections, this particular case does not involve the sort of unconstrained exercise of discretion that was present in *Delaware* v. *Prouse*, 440 U.S. 648 (1979), where police officers made random stops of motor vehicles for

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load of marijuana, and that petitioners Jenkins, White and Burdine were recruited to unload the boat or serve as lookouts, it was not sufficient to show that any of them were more than employees working for a salary. As such, they would not have possessed a legitimate expectation of privacy in the vessel or its cargo. See *Rawlings* v. *Kentucky*, No. 79-5146 (June 25, 1980), slip op. 5-7; *Rakas* v. *Illinois*, 439 U.S. 128 (1978); *United States* v. *Coats*, 611 F. 2d 37, 39-40 (4th Cir. 1979), cert. denied, No. 79-1230 (Apr. 21, 1980).

[4]The captain's spontaneous admission, immediately after the boarding, that there was marijuana aboard provided probable cause for a thorough search of the vessel. See *United States* v. *Rubies*, 612 F. 2d 397, 403 (9th Cir. 1979), cert. denied, No. 79-5954 (May 12, 1980); *United States* v. *Postal*, 589 F. 2d 862, 889-890 (5th Cir. 1979), cert. denied, No. 78-1714 (Oct. 1, 1979); *United States* v. *Odom*, 526 F. 2d 339, 342 (5th Cir. 1976). Petitioners do not contest the propriety of the search itself, but only the initial boarding of the LADY ELLEN.

registration checks. In *Prouse*, the Court specifically noted that "[q]uestioning of all oncoming traffic at roadblock-type stops" is one method of avoiding the vice of unconstrained discretion. 440 U.S. at 663; *id.* at 663-664 (Blackmun, J., concurring). As the court of appeals concluded (Pet. App. 7a, 9a), the stop of the LADY ELLEN satisfied the standards established in *Prouse* because it was performed as part of a neutral policy of stopping all American flag vessels under 250 feet in length that sailed through the Mona Passage.

Because in this case the boarding "was not one made at the will and whim of the officer in the field" (Pet. App. 7a), the decision below is not inconsistent with the decision of the Ninth Circuit in *United States* v. *Piner*, 608 F. 2d 358, 361 (1979), involving a totally random boarding of a pleasure vessel after dark for purposes of conducting a safety and documentation inspection. Nor does the decision below conflict with *United States* v. *Lee*, 274 U.S. 559 (1927). In *Lee*, this Court—relying on the doctrine of *Carroll* v. *United States*, 267 U.S. 132 (1925), with respect to automobiles—upheld a search and seizure of a vessel on the high seas by Coast Guard officers who had probable cause to believe that the vessel was being used to violate the laws of the United States. Obviously, the fact that vessels may, like automobiles, be searched upon probable cause says nothing about the question whether they may be stopped on terms more liberal than those governing the stops of automobiles.

2. Following their arrests aboard the LADY ELLEN, petitioners Rowe and Harper were promptly given *Miranda* warnings. The next morning, they were transferred to the ALERT and once again read their *Miranda* rights. Shortly thereafter, each petitioner was handed a *Miranda* warning card, containing a waiver of rights form at the bottom. Both petitioners signed their

individual waiver forms; at the pretrial hearing they acknowledged that they had understood their rights. After signing the waiver forms, each was questioned by a customs patrol agent and made inculpatory statements. The interview was recorded and signed. Later that evening, after the captain of the LADY ELLEN had expressed some interest in cooperating in a controlled delivery, petitioners were questioned by a DEA agent. Prior to this interrogation petitioners once again were given *Miranda* warnings. The questioning continued intermittently over the next few days as the ALERT sailed for North Carolina (Pet. App. 101a-102a).

Both petitioners contend (Pet. 24-25) that their statements were involuntary because: (1) they were fatigued from their voyage and got little sleep; (2) they were deliberately not taken before the nearest magistrate, in Puerto Rico, as they allege was required by Fed. R. Crim. P. 5; (3) they were promised consideration if they cooperated; (4) they were threatened with harsh sentences in Puerto Rico if they did not cooperate; and (5) they were told, when they asked about counsel, that they had to choose between seeing a lawyer in Puerto Rico and participating in the controlled delivery. The courts below properly rejected this largely fact-bound claim.

The night before they gave their statements to the customs officer, petitioners slept on pads on the mess deck of the LADY ELLEN. After being transferred to the ALERT, they slept on pads in the crew's area. The magistrate found that they were at all times "treated with due consideration and were accommodated as comfortably as was feasible under the crowded conditions and the fact that they did have to be guarded" (Pet. App. 104a). He concluded that "[t]he conditions of their confinement were not unreasonable and did not constitute oppressive treatment or duress which could have affected

the voluntariness of any statements made by them" (*ibid.*). There is no basis for questioning this finding.

Nor are petitioners aided by their claim that they were not promptly taken before a magistrate, in alleged violation of Rule 5. While delay prior to arraignment is a factor to be considered in determining voluntariness (see 18 U.S.C. 3501(b)(1)), the delay must be "unnecessary" before it will render a confession inadmissible. See *Mallory* v. *United States*, 354 U.S. 449, 455 (1957). Here, the magistrate found that petitioners voluntarily waived their right to be brought before the nearest magistrate and agreed instead to cooperate in the controlled delivery (Pet. App. 110a). Even absent a waiver, the courts below correctly determined that the delay was justified, since there was an appreciable risk that petitioners' appearance before the magistrate in San Juan would become known, jeopardizing not only the success of the controlled delivery, but petitioners' safety as well if they decided to cooperate (*id.* at 111a, 113a-114a). In these circumstances, the delay in bringing petitioners before a magistrate was not unnecessary. See *United States* v. *Odom*, 526 F. 2d 339, 343 (5th Cir. 1976).[5]

With respect to the alleged promises of consideration, the magistrate observed (Pet. App. 109a) that neither petitioner testified that any such promises were made and that the government's witnesses testified that petitioners were specifically told that they could not be given any promises in exchange for their cooperation in the

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[5]Moreover, we note that it is unlikely, even if the ALERT had steamed for Puerto Rico immediately after petitioners' arrests, that it would have arrived there by the time petitioners' initial statements were made to the customs agents the following morning (see Pet. App. 110a). Thus, even if the delay involved in making the controlled delivery was unnecessary, these statements were not the products of any such delay.

controlled delivery (*id.* at 105a-106a). Even if the officers had made statements about the harshness of sentences imposed in Puerto Rico for narcotics violations (but see Pet. App. 108a-109a), such statements would not have rendered petitioners' confessions involuntary, since petitioners were not threatened that they would be prosecuted in Puerto Rico if they did not confess to their role in the importation scheme. Finally, the suggestion—made after petitioners had already given their statements to the customs officer—that for the time being they would have to choose between seeing a lawyer at arraignment in Puerto Rico and participating in the controlled delivery (A. 838)[6] was simply an accurate description of the alternatives then open to them. If petitioners had been brought to Puerto Rico for arraignment, the success of the controlled delivery would have been compromised.

3. Petitioners Talbert and Herring contend (Pet. 21-23) that the stopping of their automobiles violated the Fourth Amendment because the officers lacked a reasonable suspicion that petitioners had violated the law. They therefore argue that the officers' testimony concerning the stops—which helped to establish petitioners' involvement in the narcotics conspiracy—should have been suppressed. The court of appeals correctly concluded (Pet. App. 12a-13a) that in the exigent circumstances presented here, the officers' actions constituted a reasonable means of apprehending individuals involved in the conspiracy.

The evidence showed that the raid at the landing site had interrupted a large smuggling operation and that suspects were dispersing from the scene. Anyone escaping from the site by car would have had to use the road on which the officers stationed themselves, since it was the

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[6]"A." refers to the appendix in the court of appeals.

only route leading away from the landing site. In addition, any lookouts seeking to return to the landing site also would have had to use the road. These facts permitted a reasonable suspicion that anyone travelling along this isolated road at 7:00 a.m. on a Sunday morning in early February was implicated in the importation scheme, justifying the minimal intrusion of a stop and a few routine questions.[7] See *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Adams* v. *Williams*, 407 U.S. 143, 145-146 (1972); *Terry* v. *Ohio*, 392 U.S. 1, 20-23 (1968); *United States* v. *Jackson*, 448 F. 2d 963, 968-970 (9th Cir. 1971).[8]

4. Petitioner Michael Benjamin Forbes was apprehended by a deputy sheriff at about 7:30 a.m. on the morning of the raid as he was standing beside a road leading to his house near the landing site. Petitioners Jackson, Jenkins, and White, together with Forbes' father, Peter Forbes, had been arrested in the house earlier that morning. The deputy sheriff recognized petitioner as a resident of the dwelling. At the time, petitioner was wearing heavy foul weather gear and boots similar to those worn by the men who had been arrested inside the house. The deputy instructed him to get into the car, and they returned to the house, where DEA agents questioned petitioner about his recent whereabouts. After Forbes stated that he had been in Morehead City all night, he was placed under arrest (Pet. App. 57a; A. 743-746). Later in the day, while in jail, petitioner conversed

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[7]In the hour and a quarter during which the checkpoint was maintained, only one car other than petitioners' was observed. The driver, a nurse on her way to work, was questioned briefly and allowed to proceed.

[8]The cases on which petitioners rely (Pet. 23) are inapposite, since in those cases the officers did not have articulable suspicion that the defendants had violated the law.

with Paul Breslin, the captain of the LADY ELLEN, who identified Forbes by his voice as the pilot who had boarded the vessel at Morehead City (A. 847-848). Petitioner contends (Pet. 25-26) that he was arrested without probable cause and that Breslin's in—court identification of him based on the earlier voice identification was therefore inadmissible as the fruit of an unlawful arrest. We disagree.

The arrest was entirely lawful. The deputy who first spotted petitioner had reason to believe that members of the conspiracy had eluded capture and would be found in the area surrounding the landing site. Recognizing petitioner Forbes as an occupant of the house near the landing site, the deputy acted properly in briefly detaining petitioner and transporting him to the house for questioning by the DEA agents. See *Adams* v. *Williams*, *supra*; *Terry* v. *Ohio*, *supra*. The agents, who ascertained that petitioner lived in the house, knew that several persons discovered inside, including Forbes' father, had already been arrested. They also knew about the electronic equipment found in the house, and about the trucks, loading devices and boatload of marijuana outside. Moreover, like those arrested in the house, petitioner was wearing foul weather gear and boots. These facts, in addition to petitioner's statement that he had returned from Morehead City, which was seven or eight miles away (Gov't Br. 65), even though petitioner had no visible means of transportation, established probable cause to believe that petitioner was involved in the conspiracy.

5. Petitioners next contend (Pet. 26-28) that the district court failed to make a de novo determination of the magistrate's recommendations on the suppression motions. This claim is without merit. In *United States* v. *Raddatz*, No. 79-8 (June 23, 1980), slip op. 5-8, this Court

concluded that under 28 U.S.C. 636(b)(1), the district court is not obligated to rehear the testimony on which the magistrate based his findings and recommendations in order to make an independent evaluation of credibility. Thus, *Raddatz* disposes of petitioners' claim to the extent that they contend they were entitled to a de novo hearing before the district court. Petitioners' further contention that the district court did not review the transcript of the evidentiary hearing before ruling on their suppression claims is contradicted by the orders of the district court disposing of their motions (Pet. App. 49a, 94a).[9]

6. Petitioners Jackson, Jenkins, White, Talbert, and Herring contend (Pet. 30-35) that the evidence was insufficient to support their convictions. This fact-bound claim is mistaken. It is well settled that participation in a conspiracy may be shown by circumstantial evidence. See, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Thomas*, 586 F. 2d 123, 132 (9th Cir. 1978); *United States* v. *Frazier*, 584 F. 2d 790, 795-796 (6th Cir. 1978). Here, petitioners Jackson, Jenkins, and White were discovered at 4:00 a.m. in the dwelling near the landing site, dressed in heavy work clothes and high rubber boots and with assorted electronic equipment, including CB radios and police scanners. Outside the house was a boatload of marijuana, several trucks lined with plastic, and loading devices. These circumstances amply established that petitioners had attempted to monitor police activity in the area, that they had been in communication with other participants in the conspiracy, and that they were preparing to unload the marijuana from the small boats onto the waiting trucks.

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[9]With regard to petitioners' additional claim that the district court failed to dispose of the remainder of their suppression motions, we note that prior to trial the court overruled "all the other exceptions to the Magistrate's rulings" (Tr. 3550).

Petitioners Talbert and Herring were discovered several hours later operating motor vehicles on an isolated dead-end road near the landing site (see page 4, *supra*). Both cars had been leased from the same company by petitioner White under the same fictitious name (Pet. App. 88a-89a). The car driven by Talbert was of the same description as the lookout car that had been observed on a bridge with its headlights on when the LADY ELLEN approached the landing site; at the time of the stop, the car was coming from the direction of the bridge. There was an antenna mount on the trunk of the car, and a microphone in the front seat (Pet. App. 84a). Petitioner Herring's automobile was travelling from the direction of another lookout point north of the landing site (Gov't Ex. 22). Herring's fingerprints were found on one of the trucks outside the house (Gov't Ex. 42), and a notebook (Gov't Ex. 29) found inside the house contains numerous references to "Reagan" and "Neil" (Talbert's middle name is Regan and Herring's middle name is McNeill).

All petitioners except Harper, Rowe and Govus further contend (Pet. 28-30) that the conspiracy effectively terminated with the seizure of the LADY ELLEN or upon its entry into United States customs waters, when, they allege, the importation was accomplished, and that the evidence was insufficient to establish their involvement prior to those events. While it is true that the conspiracy terminated as far as Rowe and Harper were concerned when the vessel was seized, and their participation in the controlled delivery was thus not in furtherance of the conspiracy, the other petitioners were unaware of the seizure. For them, the conspiracy was still alive at the time of their involvement.[10]

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[10]Petitioners' reliance on *Fiswick* v. *United States*, 329 U.S. 211 (1946), and *United States* v. *Izzi*, 613 F. 2d 1205 (1st Cir. 1980), is

Nor did the importation conspiracy terminate when the LADY ELLEN first entered United States customs waters. It was an integral part of the conspiracy that the marijuana would thereafter be transferred onto small boats for transport to shore, where it would be loaded onto waiting trucks. Petitioners' participation in the operation at the unloading stage was plainly sufficient to implicate them in the importation conspiracy. See *United States* v. *Reynolds*, 511 F. 2d 603, 607 (5th Cir. 1975).[11]

7. Petitioners also contend (Pet. 35-41) that the jury selection plan of the United States District Court for the Eastern District of North Carolina deprived them of a jury drawn from a fair cross section of the community, in violation of the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* As noted in the petition (Pet. 36 n.13), after the district court denied the challenge to the jury

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misplaced. In *Fiswick*, this Court stated that a confession terminates a conspiracy only "[s]o far as each conspirator who confessed [is] concerned * * *" (329 U.S. at 217), thus implying that the conspiracy continues with respect to the remaining conspirators. In *Izzi*, the court held that where there had been a substantial hiatus of activity in a narcotics conspiracy, an additional transaction instigated by the government through a cooperating co-conspirator was not a continuance of the initial conspiracy. Here, the actual importation of the marijuana, though "controlled" by the government, was part of the initial scheme, as were petitioners' activities in preparing for the receipt and distribution of the shipment; these activities were not part of an additional transaction.

[11]In *United States* v. *Alfrey*, 612 F. 2d 180, 186 (5th Cir. 1980), defendant Kennedy was found in street clothes on board a trawler carrying marijuana after it had entered United States waters. The court concluded that he had become involved shortly before his arrest and that the evidence was insufficient to establish that he knew of the importation conspiracy or intended to join it; however, the court did affirm Kennedy's conviction for possession with intent to distribute the marijuana. Here, the evidence showed that petitioners were actively involved in the unloading phase of the importation conspiracy.

selection procedure, all petitioners other than petitioner Herring waived their rights to a jury trial and withdrew their motions relating to the composition of the grand and petit juries. Petitioner Herring also waived his right to a jury trial, but reserved his right to raise the jury selection challenge on appeal (Tr. 3535-3536). This Court recently declined to review an identical claim, based on essentially the same data, in *Coats* v. *United States*, cert. denied, No. 79-1230 (Apr. 21, 1980). For the reasons stated in our brief in opposition in *Coats* (at 7-12),[12] the jury selection plan of the Eastern District of North Carolina comports with statutory and constitutional requirements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12]We are sending petitioner Herring's counsel a copy of our brief in opposition in *Coats*.

DOJ-1980-07